Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

OBJECTIVE LAW III*

§ 8. The Basis of the Juridical Norm

The economic or moral rule becomes a rule of law because the mass of men composing a given group understands that its respect is indispensable for the maintenance of social solidarity, and that it is just for it to receive a sanction. The rule is thus formed spontaneously in men's minds. The great merit of the German historical school of the first half of the 19th century with Niebuhr, Puchta, Savigny, Beseler, is to have understood this. Giercke and Zitelmann today are directly connected with this school. [11]

In most of these doctrines appears more or less clearly, but certainly, this conception: that the consciousness which supports the social norm and particularly the rules of law is that of the social group itself, with a personal reality distinct from that of the individuals who constitute it. The idea is not new since it is found under a form, slightly different but nevertheless identical, among the Roman lawyers who said: "Through written law, the people expresses its will directly and explicitly; through unwritten law, it reveals it tacitly." (Gaius, III, § 82)

The idea was taken up again, developed, specified, and stated in a more learned form by the historical German school which speaks of the spirit of the people, the consciousness, the will of the people, and sees in it the basis for the spontaneously formed rule of law. The acts of men, they say, seem to us individual, but in reality they are the result of the collective consciousness of the people.

Puchta, inquiring into the foundation of the obligatory force of customary law, says: "If it is true that customary law has a close and necessary interdependence with the natural thought of a people and

---

* The previous installments of this article were published in the December, 1920 and January, 1921 issues of the Columbia Law Review at pages 817 and 17, respectively.

[11] One must rely chiefly on 1 Savigny, *Système du droit romain,* (translated by Guenoux, 1840) 1 *et seq.; Vom Beruf unsrer Zeit für Gezetzgebung und Rechtswissenschaft* (3rd ed. 1840); Puchta, *Das Gewohnheitsrecht* (1828); Beseler, *Volksrecht und Juristenrecht* (1843); Zitelmann, *Gewohnheit und Irrthum* (1883) 66 *Archiv für die civilistische Praxis* 314 *et seq.;* 1 Gierke, *Deutsches Privatrecht* (1895) 160 *et seq.* The spontaneous formation of law, as of all social institutions, is unanimously admitted by modern sociology.

But it has already been said that it had an erroneous tendency to assimilate social laws to biological laws, and, on the other hand, to my knowledge there is no sociological philosopher who has tried to determine the exact moment when a social norm really becomes a juridical norm. Jurists should do this, and in France the only one who has really tried is our learned colleague and friend Gény, in a very remarkable work to which we must constantly refer. *La methode d'interprétation et sources en droit privé positif* (2nd ed. 1919) 317 *et seq.; Science et technique en droit privé positif* (Part I, 1914; Part II, 1915).

is the result of its direct activity in what concerns law, the question does not arise . . . Customary law exists and is obligatory for the same reason which causes law to exist and to be obligatory, because there is a consciousness of the people, because there are peoples. For as soon as a people is recognized as real, an activity in the mind of the people is thereby recognized, a moral and juridical consciousness, and since customary law is precisely this consciousness in its immediate natural formation, customary law necessarily comes to exist at the same time as the people." (*Loc. cit.*, p. 177) Puchta gives a very bad name to the opinion which will not recognize this collective consciousness of the people. It is, he says, "an artificial and trivial opinion, because it is the opinion of common, uneducated intelligences which stop at the exterior and for which the invisible does not exist." (*Loc. cit.*, p. 154) Later Renan accuses of coarse realism those who deny the psychological reality of great collectivities.

J. J. Rousseau had affirmed the existence of the common "Ego", of the general will, created by the social contract. This is the national will on which the political institutions of democratic peoples have been unanimously founded until the present day. The classic theory of constitutional law, which found its most complete expression in the book of the learned and much lamented Professor Esmein, sees the juridical form of opinion in the national will as distinct from the individual wills which express themselves by universal suffrage. Many modern sociologists and historians admit the reality of the consciousness of the different social groups. M. Espinas has notably placed particular emphasis on this point. (1 *Revue philosophique* (1901) 478) Renan has written: "Nations like France, Germany and England act like individuals with a definite character and mind; we can reason about them as we reason about a person. The nation, the church, the city, have a more real existence than the individual, since the individual sacrifices himself for these entities which a coarse realism considers pure abstractions." (*Discours et fragments philosophiques* 89, 91, 99)

I have always opposed these conceptions and I persist more than ever in the opinion that this personification of collectivities is only an abstraction, which corresponds to nothing real and which might have dangerous consequences, amounting to nothing less than the annihilation of the individual and his complete and entire absorption in the group. It also results from this opinion by a logical development that all value is denied to individual acts; they seem, as they do to Puchta, only manifestations of the collective consciousness of the group, or, as with many contemporary sociologists only the social consciousness and will are recognized as having any value, when in fact

[12] 1 Puchta, *Das Gewohnheitsrecht* (1828) 54, 132, 180.

there are and have always been individual wills and consciousnesses which revolt against the pretended social "Ego". If these individual acts are not considered as such, only an entirely incomplete idea of social facts is reached.

Moreover, he who affirms the existence of a social consciousness with a reality distinct from the individual consciousness, places himself on entirely extra-scientific grounds. In spite of Renan's phrase, we cannot make science, even social science, except by remaining in the completest realism. As long as the existence of the material foundation of a national consciousness has not been proved by direct observation, it is not allowable to affirm its existence and to give to it importance in a positive doctrine.

Still, let me be understood. I do not claim that human societies are not realities, that modern nations are not realities; I should certainly be entirely wrong if I saw in them only abstractions. Neither do I mean to claim that truly social acts do not exist, but only individual acts. On the contrary, I think, and to think otherwise would be going against the evidence, that the bond which unites men belonging to the same group is truly something real. I have already shown that it consists of a practical interdependence resulting from an exchange of services and a community of needs. It is also certain that many acts have a social character because they are the result of the reactions of social life, or, in other words, because they are determined by the reciprocal influences which individuals living in society exercise upon each other. Finally, there is no doubt that most of the sentiments and ideas, if not all, which make up the content of individual consciousnesses, are the product of social life, that they are derived, like the acts they inspire, from the influence which individuals, members of the same group, exercise upon each other. But I claim that it cannot be scientifically affirmed that there is a group consciousness, a group will, that the collectivity is a real person, that there is really a personified nation with a consciousness and a will. I claim that to speak of the national will, the national soul, is to speak in metaphors, nothing more.

Incontestably, at a given moment, under the action of the same causes, under the influence of the same circumstances, filled with the same traditions, aspiring to the same goal, pursuing even the same ideal, the members of the same national group think the same things, and wish the same things. At certain times, the interdependence which unites them seems closer and deeper. At periods of struggle for the defense of the soil against barbarism, as at certain times in the history of France, especially as during the great war just ended, there appears among people of the same country such an intimate unity of ideas, of sentiments, of spirit, and of will, that the entire nation seems to form only one being, and the expression

"national soul" comes naturally to the lips or from the pen. It can be said, and very rightly, that never has the unity of the national soul appeared stronger than during the great war, and that the French soul by its valor and its perseverance saved the world and civilization. Still, this is a literary formula and nothing more. In reality it is the French people, taken individually, who suffered, who willed, who acted. It is the French people who fought; it is they who in their individual consciousnesses understood that they owed it to themselves to struggle with all their energy against the barbarous invader. No social consciousness is in evidence anywhere. Let us hold to the coarse realism of which Renan speaks; there are only individuals and individual consciousnesses; scientifically, only the existence of individuals and of individual consciousnesses can be affirmed.

All the efforts undertaken to demonstrate this pretended social consciousness come back to the explanation Jean Jacques Rousseau gave of it; according to him it is a result of the social contract, or, more exactly, of the tacit assent which all the members of a group give to common life. "Immediately," he writes, "instead of the particular person of each contracting party, this act of association produces a moral and collective body composed of as many members as the assembly has voices, and which receives its unity, its common 'Ego', its life, its will, from this very act." (*Contrât social,* Book I, Chap. 6.)

Who does not see that this is only a gratuitous assertion! Because one thousand, or two thousand people wish the same thing, are directed by the same purpose, wish to act in common to achieve the same object, a consciousness and a will are not formed as a result, a personality at the same time one and collective and distinct from those of the thousand, or the two thousand contracting individuals. This has been said a hundred times; it is self-evident, and it is useless to insist upon it. Sociologists and lawyers who wish to place behind the conscious activities of individuals (which in fact are usually the results of reciprocal reactions of individuals belonging to the same group) a collectve consciousness as the foundation of those individual activities, proceed exactly as the ancient physiologists who placed an imaginary entity which they called the vital principle behind the vital phenomena of organic cells; or again as the psychologists who place behind directly observable physical phenomena an assumed thinking substance, the soul, in which men can doubtless believe if they feel the need, but whose existence cannot be scientifically admitted because it is unproved and unprovable.

The foundation of social norms in general, and of the juridical norm in particular, can be only the consciousness of the individuals, until there be the proof to the contrary, proof which it can be said without presumption will never be made.

When I say that a juridical norm exists at the moment when the mass of individuals composing a given society understand that the interdependence which unites them would be gravely compromised if this rule were not given a sanction, and that at the same time this same mass of individuals feels that it is just for this sanction to exist, I mean that it is the individuals taken separately and personally who have this consciousness. Professor Jellinek wrote that it is the belief of the members of one whole nation in the existence of a rule of law which constitutes the rule of law. Zitelmann declares "that the obligatory force of law is only and can only be psychological; that is, that the conception of the obligatory force of a certain ordinance is formed according to our faculties, for definite causes and in definite circumstances". Both are right.

§ 9. The Obligatory Force of the Juridical Norm

Can the obligatory force of a juridical norm such as I have just described be logically conceived? Many intelligent men reply "no". They declare that to recognize obligatory force in a norm so understood is contradictory in itself; that a fact cannot serve as the foundation for a rule of conduct, that an individual sentiment cannot be the source of an obligation for individuals. This objection has already been met, and I think I have shown in §§ 4 and 5 that all the objections made to my former studies are reduced to this. The time has come to discuss it thoroughly.

An understanding must be reached on the import and position of the question. What do we mean by saying that a rule has a juridically obligatory force? I have already pointed out (§§ 2 and 4) that in my mind when I say that a social norm is obligatory, it does not mean that it creates either a duty of a metaphysical nature as a burden to some person, or a right to the profit of another. The idea of duty can only be conceived as a diminution of the extent of the will of a given person; it is an inhibition of the will. Now, it is evident that a purely human rule cannot create this. The human will exists; it is what it is. We see its manifestations; we know not and shall never know its inner essence, and, consequently, the extent of its power. Unless a belief in the supernatural wills, the theocratic authorities of which Auguste Comte spoke, is accepted, a human rule, whatever it may be, cannot modify the very essence of the individual will, or diminish the extent of its powers. No more can it modify this essence of the human will by adding to it, by increasing its power, by giving it a power which it does not possess naturally; in short by investing it with a legal right. Endless controversies have arisen on the nature of legal right. This is not astonishing since the conception of legal right is only a meta-

physical hypothesis. Whatever definition be given it, it must always appear as an extension of the human will, a power which belongs to certain wills and does not belong to certain others, a modification of the essence of the human will made by adding to it. A rule, obligatory in the sense that it creates laws to the advantage of some person for whom certain obligations must be performed, can emanate only from a superior power.

Now since the existence of such a power is within the field of religious or metaphysical faith but outside of the field of science, in speaking of the obligatory force of a juridical norm, we cannot take it in the above sense. We can only take it from the positive, human, social point of view. For us, to say that a norm is obligatory, like the social norm, means simply that at a given moment, in the group under consideration, if this norm is violated, the minds of the mass understand that it is just, according to the sentiment of justice which they have at that time, and that it is necessary for the maintenance of social interdependence, that whatever conscious force there is in the group should intervene to repress this violation. To give another sense and another import to the obligatory force of a rule of law is to depart from reality and enter into the realm of metaphysical hypothesis. Moreover, let me repeat that in speaking of what the mass of individuals admits as just, I mean "just" also in an entirely relative and contingent sense, according to the sentiment of justice as I have already described it.

Once this is understood, it is evident that a rule, founded only on the consciousness which the individuals in a group have of solidarity in this group, and on the sentiment of justice with which they are imbued, can acquire a juridically obligatory force, and can possess juridical value,—what the Germans call *juristiche Geltung*. This rule, by hypothesis, not yet formulated in a positive law, becomes clear to men's minds at the moment when acts in opposition to it are performed in the group. A few spirits more enlightened than the common run can perceive it in itself, and by their influence hasten the formation of this idea in the consciousness of the mass. But it is the violation and repeated violation of a rule which makes that rule clear to the mass. Sociological observation of primitive societies has proved this and what happens even in modern societies completes its demonstration. How many things there are which were not forbidden by the penal law which, by their repetition and frequency, have made apparent to all the existence of the norm which forbade them, and caused the making of a positive law which did not create but only affirmed this pre-existing norm. When this is pointed out, it is easily perceived that once the rule is understood by the consciousness of the mass, this consciousness, when the rule is violated, rises and demands that all the force in the group intervene

to repress the violation, to chastise him who is guilty of it, and to force him directly or indirectly to perform the act which is commanded. This intervention of collective force will take place in different ways according to the degree of social organization. In societies where there is not yet any political differentiation, the victim of the violation of law intervenes alone or with the help of a few others. As soon as a beginning of differentiation, of political organization, appears, it is a chief who intervenes to assure this sanction, and if he does not intervene, he himself loses his position of chief which he owes only to the confidence which the individuals of the group have in him and in his power to give a sanction to the law of the group. The chief intervenes directly to assure the sanction, or indirectly by protecting the victim who intervenes himself with his own means of compulsion.

In societies which have reached a high degree of differentiation and political organization, there are regulated and fixed processes of law. But the same thing happens; the same social phenomenon always appears. When certain acts are performed and they appear to the mass of individual consciousnesses to atack both the social solidarity and the sentiment of justice of the period and the group, they appear as the violation of a norm, which has, from then on, a juridically obligatory character, because it seems to all legitimate and necessary for the organized legal process to be put in motion to bring about the sanction of the rule. This, and this alone, constitutes the obligatory force of a rule of law.

This conception of it also refutes an objection of another kind, made by the partisans of the idea of a collective consciousness of the people which has a real existence. The objection consists in saying that the obligatory force of law can be explained only if the source of the juridical norm is admitted to be in the consciousness and the will of the personified collectivity, because then it emanates from a personality superior to the individuals and thereby only can it be imposed upon them.

It is well known that this is the opinion of the historical German school. The rule of law is imposed, they say, because it is engendered by the collective consciousnes of the people, which, as such, is superior to the individual consciousness. He who speaks of a consciousness of the people autonomous and distinct from individual consciousness, implies at the same time a general will, a will of the entire collectivity making up one person, a will of the people or national will, superior by nature to individual wills. The rule of law expressed in written law is imposed upon individuals because the written law is the formal expression of the consciousness and will of the people. Rules of law in the form of custom are imposed because they emanate from the conscious but tacit will of the people.

"This direct consciousness of the people", writes Puchta, "exists in the individual members of the people . . . Their consciousnesses have a role here in so far as their direct foundation is this natural community . . . To define this reality still more precisely, this consciousness of the people appears in the consciousnesses of the members and thereby necessarily also in the acts which are directed by this consciousness, and which are thus the application, the exercise of law. Such acts considered by themselves (*'für sich'* in Hegelian terminology) are doubtless the acts of the individuals who perform them; but at the same time there is something collective in them which consists in the fact that they proceed from a collective consciousness, from a spirit of the people . . . Through individuals taken as such, no law can exist, no customary law, no legislative law, no law of jurists. The consciousness of an individual does not make law; and if there is a common consciousness, the community by which law is engendered comes from a union of individuals wherein they do not exist as individuals . . . The source of customary law is the natural adhesion of the consciousness of the people. This consciousness of the people takes form in custom. (*Sitte*) . . . If customary law has this close and necessary interdependence with the natural thought of the people and is the result of their natural activity in what concerns law, in reality the question as to whether and why customary law has any authority as law, does not arise: customary law exists and has authority (*gilt*) for the same reason that law has authority." I have already said that the opinion of those who did not admit this consciousness of the people, but only individual consciousnesses, has been termed by Puchta trivial and superficial; "trivial", he says, "because it is peculiarly the opinion of common, uneducated intelligence which stops at the exterior of things and for which the invisible does not exist."

Nevertheless, there are eminent jurists who think that the juridical norm has as its source and foundation individual consciousness and not this assumed collective consciousness of the people. Notably Zitelmann criticizes the doctrine of Puchta and writes, to my mind very justly, thus: "The characteristic belief underlying the whole theory of the historic school is that a collective psychical phenomenon really exists; it is called the collective consciousness of the people; it must be the consciousness of the collectivity, not necessarily of all the individuals, and so something different from the sum of the juridical consciousnes of the individuals. I consider the existence of a collective consciousness so understood as indefensible, as impossible. At the risk of passing for a vulgar materialist, I deny it. This is no case for speculation; we must see what exists in fact. My opinion is that in the formation of the idea of a collective consciousness, in the sense of an autonomous consciousness, distinct from the sum of indi-

vidual consciousnesses, and yet real, there is an absolutely inadmissible transposition, into a foreign field, of an idea taken from experience." [13]

The doctrine that affirms that the rule of law finds its foundation in the collective consciousness, in the will of the group imposed upon individuals, proceeds also from the false idea which has been formed of the character of the obligatory force of law, of the *Geltung* of the juridical norm. It is because men have always been dominated by the idea that it contained a true command spoken by a superior will to a subordinate will, that it involved a modification of the very essence of the individual wills to which it was spoken,—it is, I say, because men have been dominated by this idea, that they have wished to connect the obligatory force of law to a principle superior to humanity. For the same reason, when they have at last laid aside, and rightly, what was only a supernatural explanation, that is, none at all, and have wished to keep in the field of nature, they have imagined the existence of these two kinds of consciousness which must have a real and distinct existence and must have a hierarchical relation: consciousness of the collectivity or superior consciousness; individual consciousness or subordinate consciousness. But the assertion that there exists a collective consciousness of the people, distinct from individual consciousness, has no more value than the assertion of a supernatural entity imposing a rule of law upon men.

On the other hand, this assertion becomes absolutely useless if we hold to what was said at the beginning of this paragraph; namely, that to speak of the obligatory force of the rule of law is to say that the intervention of the social force, that is of all the material force of a group, to assure the sanction of the norm, appears necessary and legitimate to the mass of individuals composing the group. For this purpose, what difference does it make whether or not there is a collective consciousness? It is the individuals who act and who think. We shall be told in philosophic language: for themselves (*für sich*) the acts and thoughts of individuals are individual acts and thoughts; but in themselves (*an sich*) they are social acts. Pure verbalism! Individuals think and act. From the moment that they live in society, they are conscious of their subjection to certain rules of conduct. These rules are of different kinds. Whatever they are, they exist, because the individuals taken individually are conscious that they should exist and that they are both the condition and the consequence of social life. As far as the rule of customs and the economic rule are concerned, it is admitted that they find their basis in individual consciousnesses and wills. Why should it be otherwise with the rule of law which is only a moral or economic rule, receiving a sanction

[13] *Gewohnheit und Irrthum* (1883) 66 *Archiv für civilistische Praxis* 419.

from social compulsion, under the action of the double sentiment of sociality and justice.

To sum up, we must choose. Either the obligatory force of the juridical norm must be connected with an absolute principle, revealed to man by a supernatural power, in which case this norm creates duties and rights in the metaphysical sense of the word; or else a purely human foundation must be given to the juridical rule, and in this case if it has an obligatory force, it can only be in the sense already explained, that is, a force consisting in the fact that it receives a sanction and is guaranteed by the setting in motion of social compulsion. Then, it finds its foundation naturally in the adhesion of individual consciousnesses whose content the observer determines, infinitely changing, continually varying with times and countries, but always connected with the fact of a social solidarity which is always felt, and with the sentiment of justice, variable in its manifestations, but permanent in its principle.

If the juridical norm so understood be called natural law, if we are told, as M. Gény, M. Platon and M. Charmont tell us, that this is going back to natural law, I do not contradict them. Only, we must understand each other about terms, and we should designate different things by different words. Up to the present, the name "natural law" has been given to law conceived as being founded on a superior principle always identical in its essence though variable in its manifestations, ideal, absolute law, which men should work to approach more closely each day. The juridical norm as I understand it is, on the contrary, the contingent result of facts; it is in perpetual evolution. It is possible that human societies are tending toward a certain end, I do not deny it; but I do not know what this end is. Men in the same group have a close interdependence without which individual life would be impossible. They have the feeling that the observation of certain rules is necessary to assure their social life and their individual life which depends on it; they have the feeling that it is just for these rules to receive sanction and these rules are what we call juridical norms. I am willing that they be called natural law, but let an agreement be reached and a recognition made that entirely different things are being designated by the same expression.

§ 10. Custom and Jurisprudence

The foundation, character, and object of the rule of law once defined, it remains for us to show how it appears to the observer, and this brings us to the problem of custom, jurisprudence, and positive law.

The problem is usually stated thus: are custom, jurisprudence, and legislation sources of law? If they are, have they the same amount of energy? How and why are they sources of law?

The problem is badly stated; what precedes shows why. To ask whether a certain social element is a source of law, is to ask whether this social element makes a rule obligatory in the sense already explained, that is, whether it appears to the mass of individual consciousnesses to legitimize the intervention of all the compelling force in a given society to furnish a sanction for this rule. Now, the only social element which can give this character to a rule is the consciousness existing in the mass of individuals composing the group that it is necessary for the maintenance of social solidarity and that it is just for a sanction of social constraint to intervene. Now, neither custom nor jurisprudence, nor legislation itself, constitute in themselves this element, which is, according to Zittelmann's expression, a purely psychological element. They only allow the observer to ascertain it. According to the formula which I used before, I say that custom, jurisprudence and legislation are not sources of law, but ways of ascertaining the rule of law.

Let us consider custom first. To understand the import of my proposition, it is important to come back briefly to the distinction already explained (§ 6) between constructive rules of law and standardizing rules of law.

The standardizing rule of law is a prohibitive or imperative disposition. The constructive rule of law determines the measures used to assure the realization of the prohibition or of the command, the performance of the act imposed, the suppression of the prohibited attitude, the punishment of the forbidden act. The existence of constructive rules incontestably implies a political differentiation in the social group under consideration, no matter how rudimentary it may be; I mean a differentiation between the weak and the strong, between those who control a social force and the other individuals; in a word, between governors and governed. These rules are really addressed exclusively to the governors, when this word is taken in as broad a sense as possible to designate all those in the group who control a power of constraint in any form.

When this is understood, if everything that appears to be a customary juridical rule is examined, it should be recognized that it is never anything but a constructive rule, whatever domain of law be considered. To demonstrate this completely, it would obviously be necessary to make a detailed historical study, which cannot be undertaken here. It is enough to give a few examples.

Incontestably, it is in the domain of penal law that juridical customs appeared earliest. All that we know of primitive populations and of very ancient Germanic and Roman customs tends to prove this. It is according to custom that he who controls force intervenes. For instance, in the period when private vengeance is permitted, he intervenes according to custom to protect it. When the repression of the

infraction consists, as in ancient Germanic populations, in a reparation owed by the author of the infraction to the victim or his family, the chiefs who control force intervene to compel the payment of the indemnity. If all the ancient forms of penal law are examined, it will always be seen that custom determines the measures used to give sanction to the penal norm. It does not create the norm; it creates only the measures used to furnish it with a sanction. If custom constitutes an obligatory rule, it is not by itself, it is not because custom is a source of law, but simply because the measures resulting from usage have as object and result the realization of a juridical norm, which is obligatory in itself for the reasons already shown.

It is not custom which, at a given moment, created the norm forbidding murder or theft in a society. Custom only created the measures used to furnish this prohibition with a sanction. There is then no necessity for trying to find an explanation for the juridically obligatory force of custom, the *"rechtliche Geltung"* of custom, according to the German expression. The numerous systems which have been propounded on this point have no *raison d'être;* the question does not arise. Custom creates the measures used to give sanction to a norm which existed before custom and which is obligatory in itself; it receives all its force from the norm to which it tends to give a sanction. For the observer, it is a convenient way of getting a conception of this norm; it is a way to ascertain objective law and nothing more.

What I say of custom in the domain of penal law is as true in the domain of civil law and particularly of the law of contracts. In Roman law and in very ancient French law, the formalism regulating contracts created by customs is only a totality of material measures used to assure the realization of the norms regulating the relations of individuals among themselves and especially of those obliging contracting parties to respect the agreements entered into. The measure is often crude and sometimes goes beyond the purpose sought. But this is only because it is inadequate, a fact which is not at all surprising in societies where civilization is little developed. It is not less true that all the juridical rites created by custom in populations whose history we know contain rules of a constructive nature whose goal is not in themselves, but which tend to realize a norm whose existence they reveal to us. The obligatory character of ritual custom receives its force from this norm itself, of which it is only a development. It establishes nothing but the constructive measure of an already existing standardizing rule.

When, later, formalism disappears and custom comes to supplement the silence of the contracting parties and to determine the extent and the import of the clauses of contracts, it still appears to us with

the same character of an exclusively constructive rule. It is addressed only to the public agents whose duty is to assure the realization of law. The contracting parties can make detailed agreements. If they do not do this, the judge applies custom, (that is the agreement usually made), to interpret agreements; it must naturally be conjectured that the parties, not having explained themselves, wished to refer to custom. Thus custom contains no injunction addressed to individuals, but only a rule of interpretation for the judge. To repeat, it establishes only technical measures to realize a juridical norm, that which demands respect for agreements. It does not create this norm. It is not a source of law, properly so-called, any more than before.

Perhaps it might be claimed that certain customs are different—for instance, that which regulates the order of succession—because at first sight there does not seem to be any standardizing rule to support it. Nevertheless, even with these customs, I think that they are only secondary rules, based on an underlying juridical norm whose realization they tend to assure. In fact let it be noted that every system of succession is based on a certain conception of the family and that the historic evolution of the family is directly and clearly manifested in the evolution of systems of succession. It would be easy to illustrate this proposition by numerous examples taken from Roman law, from ancient French law, from modern law. The standardizing rule which serves as a foundation for the customs regulating succession is perceived, then, in the statute of the family itself, in a certain conception of the family at a given moment, in the norm which settles that the individuals who have sprung from the same origin shall remain more or less closely united.

Nowhere does the purely constructive and technical character of custom appear more clearly than in commercial law, which, at the legislative stage of juridical evolution which we have reached at present, remains most particularly the domain of custom. All the processes which were first created by commercial custom and often confirmed later by legislation, have no other object than to determine rapid means for the realization and sanction of legal relations, usually concerned with contracts. They all have as foundation the norm demanding respect for agreements. These processes became general because in usage they were seen to be convenient and practical. Thus judges came to recognize them and to guarantee them. They have acquired an obligatory force for the judge and for him only; individuals are not obliged to have recourse to them. All the elements of commercial customs are exclusively technical processes, always receiving their value from the norm behind them. In the interpretation of commercial agreement, in which custom plays such an important part, all that I have already said concerning the agreements of civil law finds its application.

Finally, in the domain of public law, the exclusively constructive character of custom is obvious. It is the practce followed exclusively by public agents which constitutes the custom causing the technical rule. It is because those who control force have acquired the habit of proceeding in such and such a way to furnish a sanction for a pre-existing rule that they feel themselves obliged to continue to proceed in this way. How can the consciousness of the people be spoken of here since the mass of individuals does not intervene at all, but only a small group who control power, the governors or their agents. The method of procedure which they use becomes little by little a rule of law, because its object is to furnish a sanction for a rule which has profoundly penetrated the mass of minds, a rule which they conceive necessary for social solidarity and in conformity with justice. Examples proving this are abundant. It is enough to point out one of the most interesting creations of custom in modern law, appeal from excess of authority. It is nothing but the creation of a technical procedure, a legal process, to give a sanction to the norm which has so profoundly penetrated the modern juridical consciousness, according to which no individual decision can be made except in conformity with a disposition which has been pre-established and published in accordance with some regular method.

When custom is so understood, I have already said that the interminable controversies on the point of knowing whether custom is a source of law and how it can be a source of law, become useless. At the same time, the role and character of jurisprudence become apparent. I use this word "jurisprudence" here in a broad sense, its etymological sense, which is different from that in which French jurists usually use it in opposing it to "doctrine." Jurisprudence as I understand it here is the totality of solutions given by all those who, in a given country, are supposed to have a knowledge of law—professional jurists and public officials.

The German historical school, with Savigny, Puchta, Beseler, made of the law of jurists (*Juristen-recht*) a third course of law in addition to custom and legislation. I have never been able to understand why. Nevertheless, I believe that they were dominated by the remembrance of Adrian's edict deciding that the judge shall be bound when on a given point there shall be unanimity of the jurists who have received the *"jus publice respondendi";* and also by the memory of the "law of citations" of Theodosius the Younger, granting to the writings of five jurisconsults the privilege of being binding upon the judge. But these memories of Roman law have no place here, and I do not see why a rule formulated by the wisest jurisconsults, even if they were unanimous, should in itself be a juridicial norm. But jurists can and should work to discover the true rule of law, not that they should formulate it *a priori,* but, on the contrary, they should

observe all the elements which can help them to ascertain it, these elements being essentially legislation, the customs actually followed, economic needs, aspirations towards the realization of justice, in a word, the totality of the social facts of which the juridical norm is a product. This observation is at the same time psychological, moral, economic, and material, and should be made according to the rules of the critical method.

The rule of jurisconsults is not limited and should not be limited to thus discovering the norm which is a product of the social consciousness; they can and should help also in forming a certain state of consciousness. I do not believe in the preponderating, exclusive, influence of a few directing minds in the formation of the ideas of a social group; but I believe, nevertheless, that their action cannot but be recognized. Incontestably, jurists can help form a certain state of consciousness in the group, from which will issue a juridical norm. It is in this sense, strictly speaking, that one may use the term "the law of jurists" (*Juristen-recht*) as the German historical school does. But this influence can be real only at a period when scientific work has been highly developed and consequently at an advanced period of juridical evolution. On the other hand, it is greatly impeded by legislative codification. Indeed I cannot repeat too often that the adhesion, even the unanimous adhesion, of jurists, cannot make a rule into a juridical norm. They can only bring to light a rule already existing in the popular consciousness and give it a precise formula. If they have been able to help form the state of consciousness from which it is derived, it is always the adhesion alone of the individual consciousnesses of a social group which gives to a rule its juridically obligatory character.

Jurists can thus erect a veritable juridical work of art. In a period when social relations become more and more complex, the processes of juridical technique necessarily become more and more complicated. The mission of jurists is to erect them, and so prepare and facilitate the legislative work. Before the intervention of legislation, a custom is often formed determining certain technical processes. The intervention of jurists will be a useful contribution in directing and completing the formation of these processes. There is no law of jurists here any more than before. If there is a desire to use this expression for convenience's sake, no other import than this should be attributed to it; the studies of jurisprudence are a factor in the formation of custom; they help create constructive rules which are based on juridical norms and receive from them their obligatory character.

Thus the double task of the jurist appears clearly; a truly scientific task—to discover the rule of law under the social facts; and a task of technical art—to prepare the customary or written rule, a con-

structive rule tending to determine the import and to guarantee the realization of the norm. Jurists should never forget that in the double task which falls to them they should always follow the positive method and lay aside all *a priori* metaphysical conceptions and all artificial fictitious processes.

Even before the jurisprudence of jurists has affirmed itself, the chronological order has been that the jurisprudence of tribunals has already been formed, that is, the totality of decisions made by public officials on the disputes submitted to their judgment. Very early in the history of human societies there appears incontestably the jurisdictional function of the governors, and that, too, long before men have realized the true characteristics of this function. The method of intervention of those who control force has been infinitely variable and it cannot be a part of my plan, here any more than formerly, to make a detailed study of the first forms of the jurisdictional function. But all that is known of populations which have remained in a primitive state and of the very ancient law of historical peoples, shows that very early disputes arising between two or several members of the same group were taken before those who held power in the group, or before their agents, who were asked to apply or to assure the application of a rule considered as imposing itself on the group. The methods of intervention of the chief have been infinitely diverse. His role is sometimes limited to ascertaining the result of the physical combat taking place between the two parties. Moreover, his intervention was subordinated to the use of established formulas and to the performance of certain rites. All these different elements are of a secondary nature; the fact remains that from very remote antiquity, in still primitive populations as well as in great modern nations, in the case of a conflict between two or several members of the social group, he who controls force intervenes to regulate the dispute which is decided according to precedent; thus as soon as a series of decisions of the same import has been made, a rule of jurisprudence is established according to which later decisions will be made until the time when written law comes to confirm, modify, or suppress, at least if it can, this rule of jurisprudence.

Could there then be, beside customary law, a law of tribunals also? Not at all, no more than there is a law of jurists. Men can speak if they wish of the law of tribunals, but in the sense and with the import which I have given to the expression "law of jurists" and nothing more. The role of the jurisprudence of tribunals is to my mind entirely analogous to that of the doctrine of jurists. Tribunals before which a litigation has been brought should strive to discover the juridical norm according to which the litigation should be decided and to do this they should proceed as do the jurists: examine the facts, seek out the aspirations and tendencies of the time, the

needs of social solidarity and the solution which the sentiment of justice demands. When the same litigious question has been brought before them several times, judges will reach the same decision and will naturally apply the same rule. Their decisions will appear to the superficial observer like the creation of a new juridical norm. It is not this at all. Judges are only interpreters; it is true that they have brought to light a rule of law; but this rule existed before their decisions; it imposed itself upon them; it receives its obligatory force, not from the formula repeated by the judge, but from the more or less obscure individual consciousnesses in which it was formed. If these decisions of the judge are applied without resistance, and if the mass of individuals bow before them, it is proof that they are in conformity with the true juridical norm. Often also the decision of the judge will hasten and complete the formation already taking place in the consciousness of the social group. Judges can be inspirers and initiators; they are never and can never be creators.

Like jurists, they erect technical systems of constructive rules—this is their principal role. Such was the magnificent work of the praetor at Rome and of the Council of State deciding litigations in France. These constructive rules become rules of jurisprudence, or customary rules if you wish, before being adopted and given a sanction by positive law, as often happens. The law of tribunals can be spoken of, but in the same sense and with the same import with which I have spoken of the law of jurists. Tribunals discover and give expression to the standardizing rule; they do not create it—it is valid in itself. They help in the formation of certain customary constructive rules; they create an important element in the formation of custom. But customary law so formed does not receive its obligatory force from the decisions of tribunals any more than tribunals consider the law formed by jurists as thus receiving its force.

Customary law, however it be formed, is always a constructive or technical law, receiving its force only from the juridical norm it tends to put into practice. Thus is solved the problem discussed of knowing how to explain the obligatory force of the jurisprudence of jurists and tribunals. The problem, to tell the truth, does not exist any more than the problem of the obligatory force of custom in general.

I have now examined the role and the validity of custom and jurisprudence leaving legislation out of account, because it was the only way to approach the question in its reality and to give it its true solution. But in modern societies the problem of custom and jurisprudence does not present itself in this isolated form. Actually it ap-

pears to us especially in the combination of custom and of jurisprudence with legislation, a question which will be studied later.[14]

[TO BE CONCLUDED]

LÉON DUGUIT

DEAN, FACULTY OF LAW,
UNIVERSITY OF BORDEAUX

[14] The question of the nature and role of custom and jurisprudence has produced a vast literature in France, Germany and Italy. I give here a few references to it. In France, the question has only been studied really seriously for a few years. The fundamental work is the splendid book already mentioned of M. Gény, *Methode d'interprétation et sources en droit privé positif* (1899) particularly all the third part (2nd ed. 1919, 2 vol.) in Volume I, at pp. 317 *et seq.* Consult also: Lambert, *Études de droit commun législatif* (1901, 2 vol.) Bonnecasse, *La Thémis, introduction générale à l'histoire du droit privé en France de 1789 à 1830* (1914); *La Faculté du droit de Strasbourg* (1916); *L'École de l'exégèse en droit civil* (1919); Tanon, *L'Évolution du droit et la conscience sociale;* Ripert, *Droit naturel et positivisme juridique* (1918) *Annales de la Faculté de droit d'Aix;* Valette, *Rôle de la coutume dans l'élaboration du droit* (1908, *thèse* Lyon); Lefévere, *La coutume en droit publique* (1919, *thèse* Bordeaux).

Many interesting ideas will be found in the book of M. Maxime Leroy, *La coutume ouvrière* (1913).